

**STATE OF COLORADO
TITLE V PROGRAM SUBMITTAL**

IV. ATTORNEY GENERAL'S OPINION

TAB D

COLORADO AIR POLLUTION CONTROL DIVISION
IV. ATTORNEY GENERAL'S LEGAL OPINION

Does the program submittal contain the following: [70.4(b)(3)]

- | | |
|--|---|
| <p>[X] _____

_____</p> | <p>A. A Statement of adequate legal authority to carry out all aspects of the program from the Attorney General or the attorney for those State, local, or interstate air pollution control agencies that have independent legal counsel.</p> |
| <p>[X] _____

_____</p> | <p>B. If the opinion is issued by an official other than the Attorney General, a certification that the official has full authority to independently represent the State agency in court on all matters pertaining to the program.</p> |
| <p>[X] _____

_____</p> | <p>C. Citations in the legal opinion to specific statutes, administrative regulations and, where appropriate, judicial decisions that demonstrate adequate authority.</p> |
| <p>[X] _____

_____</p> | <p>D. The provisions included in Attachment A.</p> |

ATTACHMENT A

COLORADO AIR POLLUTION CONTROL DIVISION ATTORNEY GENERAL'S LEGAL OPINION

A. General Program Requirements. Does the Attorney General's legal opinion contain documentation of adequate legal authority to carry out each of the following activities? [70.4(b)(3)(i - ix)]

[X] _____

[X] _____

[X] _____

[X] _____

[X] _____

1. Issue permits to all sources subject to the program that incorporate and assure compliance with all applicable requirements and the requirements of the Part 70 regulations.
2. Incorporate appropriate monitoring, record keeping, reporting, and compliance certification requirements into permits (consistent with the permit content requirements in section 70.6 of the Part 70 regulations and, for affected units under Title IV of the Act, subpart E of the Part 72 regulations which are reflected in Attachment D).
3. Issue permits for a fixed term not to exceed 5 years.
4. Issue permits for solid waste incineration units combusting municipal waste, subject to standards under section 129(e) of the Act, for a period not to exceed 12 years and review such permits at least every 5 years.
5. Terminate, modify, or revoke and reissue permits for cause.

[X] _____

[X] _____

[X] _____

[X] _____

[X] _____

6. Enforce permits, permit fee requirements, and the requirements to obtain a permit consistent with the section 70.11 requirements which are reflected in Attachment F.

7. Make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report under section 503(e) of the Act except for information entitled to confidential treatment under section 114(c) of the Act.
NOTE: The contents of a permit shall not be entitled to confidential treatment under section 114(c) of the Act.

8. Not issue a permit if the Administrator in a timely manner objects to its issuance either during the EPA review period or as a result of a public petition for EPA to object.

B. Default Issuance of Permits. Does the Attorney General's legal opinion certify that no applicable provision of State law requires that a permit will be issued, modified, or renewed after a certain time if the permitting authority has failed to take action on the application and that there is no other similar provision providing for default issuance of a permit unless EPA has waived such review for EPA and affected States? [70.8(e)]

C. Judicial Review - Permit Action. Does the Attorney General's legal opinion contain documentation of legal authority for the following? [70.4(b)(3)(x) and xii)]

1. The permitting authority will provide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of such actions under State law (as limited by reasonable standing restrictions under State law).

[X] ☐ _____

[X] _____

[X] _____

[X] _____

[X] _____

2. ☐ The opportunity for judicial review noted in item # C. ☐ above shall be the exclusive means of obtaining judicial review of final permit actions in State court.

3. Petitions for such judicial review must be filed:

a. Within 90 days (or such shorter time as the permitting authority designates) after final permit action, or

b. Except for a final permit action under the Acid Rain portion of the program, within 90 days after new grounds for review arise (or such shorter time as the permitting authority designates) if the petition for review is based on grounds arising after the deadline for judicial review.

4. The provisions restricting access to judicial review for persons participating in the public comment process do not exceed the limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

D. Judicial Review - Failure to Act on Permit. Does the Attorney General's legal opinion contain documentation that a cause of action exists to compel issuance of the permit or permit revision if the permitting authority fails to do the following? NOTE: If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit. [70.4(b)(3)(xi and xii)]

1. Take action on an application for a permit, permit renewal, or permit revision within the timeframe specified in the program for taking those actions.

[X] _____

2. Take action on a minor permit modification within 90 _____s of receipt of the application or 180 days for those minor permit modifications subject to group processing, or within 15 days after the end of EPA's 45-day review period [see section 70.7(e)(2)(iv) and (3)(iv)], whichever is later, if the program allows sources to make changes subject to post hoc review.

E. Acid Rain Program. Does the Attorney General's legal opinion contain documentation that assures the following?

[X] _____

1. The authority of the permitting agency is consistent with, and cannot be used to modify, the Acid Rain Program requirements in the Part 72 regulations. [70.4(b)(3)(xiii)]

[X] _____

2. Broad legislative authority exists to create, administer, and enforce an acid rain permitting program that is consistent with the provisions of Title IV and its implementing regulations contained in the Code of Federal Regulations. NOTE: If not, see item # IX. A. 4. of the main checklist.

[X] _____

F. Section 112 Programs. Does the Attorney General's legal opinion state that the State has authority to issue Part 70 permits that assure compliance with all currently applicable requirements in section 112 of the Act and all future section 112 requirements contained specifically in Attachment I? NOTE: If not, see item # IX. B. 2. of the main checklist.

G. Enhanced Monitoring Program. Does the Attorney General's legal opinion state that the permitting authority has authority to do the following: NOTE: If not, see item # IX. C. of the main checklist.

[X] _____

1. Adopt into permits and enforce any requirements established under the enhanced monitoring requirements of sections 114(a)(3) and 504(b) of the Act.

[X]

☐ _____

2.

☐ Use any monitoring data to determine compliance and ☐ Use this data for direct enforcement



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ATTORNEY GENERAL'S OPINION

October 25, 1993

Pursuant to my authority as Attorney General for the State of Colorado and in accordance with Clean Air Act ("CAA") § 502(d), as amended, (42 U.S.C. § 7401, et seq.), and 40 CFR § 70.4(b)(3), it is my opinion that the laws of the State of Colorado provide adequate authority to carry out all aspects of the program submitted by the Colorado Air Quality Control Commission to the EPA for approval to administer and enforce the operating permits program under title V of the CAA. The specific authorities provided, which are contained in statutes, regulations, or other legal authorities lawfully adopted, and which shall be fully effective by the time the program is approved, include those identified below.

I. AUTHORITY TO ISSUE PERMITS

State law provides authority for the Colorado Air Pollution Control Division to issue operating permits to all air pollution sources within the State that are required to have permits pursuant to CAA § 502(a) and 40 CFR section 70.3, and to incorporate into permits and assure compliance with each applicable requirement of the CAA and the requirements of 40 CFR part 70. State law also provides authority to issue operating permits for solid waste incineration units combusting municipal waste pursuant to CAA § 129(e) that assure compliance with all applicable requirements of the CAA and the requirements of 40 CFR part 70.

Federal Authority: CAA §§ 129(e), 502(a)-(b), 503, 504(a), 42 U.S.C. §§ 7429(e), 7661a(a)-(b), 7661b, 7661c(a); 40 CFR §§ 70.4(b)(3)(i), 70.4(b)(3)(iv), 70.4(b)(3)(v), 70.5(a), 70.6, 70.7(b).

State Authority: §§ 25-7-105(12), 25-7-114.3, 25-7-114.4(1)(c), 25-7-114.4(1)(e)-(f), 25-7-114.4(1)(k)-(l), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 C.C.R. 1001-5, Part C, §§ II.A.1.a.-f., V.C.1., V.C.4.-7. (Adopted July 15, 1993; Effective: September 30, 1993).

II. AUTHORITY TO ISSUE PERMITS TO NONCOMPLYING SOURCES

State law provides authority for the Colorado Air Pollution Control Division to issue permits to sources that are not in compliance with applicable requirements, and to include compliance schedules in permits to bring sources into compliance.

Federal Authority: CAA §§ 502(b)(5)(A), 504(a), 42 U.S.C. §§ 7661a(b)(5)(A), 7661c(a); 40 CFR §§ 70.5(c)(8), 70.6(c)(3).

State Authority: §§ 25-7-105(12), 25-7-114.4(1)(e), C.R.S. (1989 & 1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ III.C.9., V.C.16.c.-d. (Adopted July 15, 1993; Effective September 30, 1993).

III. PERMIT BOARD MEMBERSHIP AND CONFLICTS OF INTEREST

State law provides that no State board or body which approves operating permits, either in the first instance or upon appeal, shall be constituted of less than a majority of members who represent the public interest and who do not derive a significant portion of their income from persons subject to operating permits. State law also provides that any potential conflicts of interest by members of such board or body or the head of any executive agency with similar powers be adequately disclosed. State law also provides that no permit for a solid waste incinerator unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

Federal Authority: CAA §§ 128(a)(1)-(2), 129(e), 42 U.S.C. §§ 7428(a)(1)-(2), 7429(e); 40 CFR § 70.4(b)(3)(iv).

State Authority: §§ 25-7-104(8), 25-7-105(12), 25-7-111, 25-7-114.4(1), 25-7-114.3(1), C.R.S. (1989 & 1993 Supp.), 24-18-108, 24-18-108.5, 24-18-110, C.R.S. (1988 & 1993 Supp.); Air Quality Control Commission's Procedural Rules, 5 CCR 1001-1, section IX (Effective date: July 30, 1984).

Remarks of the Attorney General: There is no express prohibition in state law against the issuance of an operating permit for a solid waste incinerator unit by an agency, instrumentality, or

person that is also responsible for its design, construction or operation. However, the State Act, at sections 25-7-105(12) and 25-7-114.4(1), requires the Air Quality Control Commission to promulgate regulations that meet the minimum federal requirements of the title V program, and so such a federal prohibition is implied in the State laws. Additionally, section 25-7-111(1) makes the Air Pollution Control Division responsible for administering the Air Quality Control Commission's air quality programs, and section 25-7-114.3(1) designates the Division as the state permitting authority. The Division has no authority to design, construct, or operate a solid waste incineration unit.

IV. PERMIT FEES

State law provides authority for the Colorado Air Pollution Control Division to assess and collect annual permit fees from sources within the State which are subject to the requirements of title V of the CAA and 40 CFR part 70, in an amount sufficient to cover all reasonable direct and indirect costs required to develop, administer, and enforce the State's title V program.

Federal Authority: CAA § 502(b)(3)(A), 42 U.S.C § 7661a(b)(3)(A); 40 CFR §§ 70.9(a)-(d).

State Authority: §§ 25-7-114.7(2)(a)(I)(A)-(C), 25-7-114.7(2)(b)-(c), C.R.S. (1993 Supp.).

V. PERMIT TERM

State law provides authority to issue operating permits for a fixed term not to exceed 5 years. State law provides a fixed term not to exceed 12 years for solid waste incineration units combusting municipal waste pursuant to CAA § 129(e) and a review of such permits at least every 5 years. State law provides authority to issue permits with acid rain provisions for a fixed term of 5 years.

Federal Authority: CAA §§ 129(e), 408(a), 502(b)(5)(B), 42 U.S.C. §§ 7429(e), 7651g(a), 7661a(b)(5)(B); 40 CFR §§ 70.4(b)(3)(iii)-(iv), 70.6(a)(2), 72.70(b), 72.72(a).

State Authority: § 25-7-114.4(1)(j) (1993 Supp.); Air Quality Control Regulation No. 3, 5 CCR 1001-5, Part C, § V.C.2. (Adopted July 15, 1993; Effective: September 30, 1993).

Remarks of the Attorney General: State law establishes a 5-year permit term for all sources subject to the State's title V program (§ 25-7-114.4(1)(j), C.R.S. (1993 Supp.)).

VI. MONITORING, RECORDKEEPING, AND REPORTING

State law provides authority to incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into operating permits consistent with 40 CFR § 70.6. State law provides authority to incorporate into the permit periodic monitoring or testing requirements where the existing State implementation plan or other applicable requirement does not contain such a requirement, consistent with 40 CFR § 70.6(a)(3)(i)(B).

Federal Authority: CAA §§ 502(b)(2), 503(b)(2), 504(a)-(c), 42 U.S.C. §§ 7661a(b)(2), 7661c(a)-(c); 40 CFR §§ 70.4(b)(3)(ii), 70.6(a)(3), 70.6(c)(1), 70.6(c)(5).

State Authority: §§ 25-7-114.4(1)(c), 25-7-114.4(1)(f), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-1, Part C, §§ V.C.1., V.C.4.-7, V.C.16. (Adopted July 15, 1993; Effective: September 30, 1993).

VII. INSPECTION/ENTRY AUTHORITY

State law provides authority to incorporate into permits inspection and entry requirements consistent with 40 CFR § 70.6(c)(2).

Federal Authority: CAA § 504(c), 42 U.S.C. § 7661c(c); 40 CFR §§ 70.6(c)(2).

State Authority: § 25-7-114.4(1)(c), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, § V.C.16.b. (Adopted July 15, 1993; Effective September 30, 1993).

VIII. INCORPORATION OF ALL APPLICABLE REQUIREMENTS INTO PERMIT

State law provides authority to incorporate into an operating permit, upon issuance or renewal, all applicable requirements as defined in 40 CFR § 70.2, and as provided generally in the CAA and 40 CFR part 70.

Federal Authority: CAA §§ 502(b)(5)(C), 504(a), 42 U.S.C. §§ 7661a(b)(5)(C), 7661c(a); 40 CFR §§ 70.4(b)(3)(v), 70.6(a).

State Authority: §§ 25-7-109.1 and 109.3, 25-7-114.3, C.R.S. (1993 Supp.) (see Additional Remarks of the Attorney General, paragraph no. 3 below for description of Section 112(g) and (j))

authority, and authority to incorporate EPA-promulgated hazardous air pollutant regulations into operating permits pursuant to emergency rulemaking); 25-7-114.4(1)(l), C.R.S. (1993 Supp.); Section 25-7-114.3(2), C.R.S. (1993 Supp.) (Early Reductions); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ V.C.1.-17. (Adopted July 15, 1993, Effective September 30, 1993).

IX. PERMIT REOPENING

State law provides authority to revise permits with remaining terms of 3 or more years to incorporate new applicable requirements which become effective after issuance of the permit. State law provides authority to reopen permits when additional acid rain requirements become applicable, regardless of the remaining permit term. State law provides authority to terminate, modify, or revoke permits for cause at any time during the permit term consistent with 40 CFR §§ 70.7(f) and (g).

Federal Authority: CAA §§ 502(b)(5)(D), 502(b)(9), 42 U.S.C. §§ 7661a(b)(5)(D), 7661a(b)(9); 40 CFR §§ 70.4(b)(3)(vi), 70.6(a)(6)(iii), 70.7(f)-(g).

State Authority: §§ 25-7-114.3(4), 25-7-114.4(1)(k), 25-7-114.4(2), 25-7-115(3)(b), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ V.C.11.a.-e., XIII.A. (Adopted July 15, 1993, Effective September 30, 1993).

X. OPERATIONAL FLEXIBILITY

State law provides authority to issue permits which allow changes within a permitted facility without requiring a permit revision if the changes are not modifications under any provision of title I of the CAA, and the changes do not exceed the emissions allowable under the permit, provided that the source provides at least 7 days' written notice to the State and to the EPA. State law provides authority for permits to include terms and conditions for reasonably anticipated, alternative operating scenarios in permits.

Federal Authority: CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10); 40 CFR §§ 70.4(b)(12), 70.6(a)(9).

State Authority: §§ 25-7-114.4(1)(n), 25-7-114.5(10), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part A, §§ IV.A.-C., Part C, §§ VC.14.-15., XII.A.-B. (Adopted July 15, 1993, Effective September 30, 1993).

XI. PERMIT MODIFICATIONS

State law provides authority to process permit modifications in a manner that conforms to, or is substantially equivalent to, the procedures set forth under 40 CFR § 70.7(e).

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 CFR §§ 70.4(b)(13), 70.7(e).

State Authority: § 25-7-114.4(1)(i), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ III.B.2., X, XI (Adopted July 15, 1993, Effective September 30, 1993).

XII. PUBLIC PARTICIPATION

State law provides authority for procedures to allow public participation in the Colorado Air Pollution Control Division's and Air Quality Control Commission's action to issue or deny an operating permit, to modify a permit [except as provided in 40 CFR §§ 70.7(e)(2) and (3)], or to renew a permit. Public participation under State law includes the opportunity for public comment and the opportunity for a hearing on draft permits in accordance with the requirements of the CAA and 40 CFR § 70.7(h). State law provides for affected States to review permit applications in accordance with the CAA and 40 CFR § 70.8(b).

Federal Authority: CAA §§ 502(b)(6), 505(a)(2), 42 U.S.C. §§ 7661a(b)(6), 7661d(a)(2); 40 CFR §§ 70.7(h), 70.8(b).

State Authority: §§ 25-7-114.4(1)(m), 25-7-114.5(6), 25-7-114.5(7)(a), 25-7-114.5(11), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ VI, IX (Adopted July 15, 1993, Effective September 30, 1993).

XIII. PUBLIC ACCESS TO PERMIT INFORMATION

State law provides authority to make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report, except for information entitled to confidential treatment. State law provides that the contents of an operating permit shall not be entitled to confidential treatment.

Federal Authority: CAA §§ 114(c), 502(b)(8), 503(e), 42 U.S.C. §§ 7414(c), 7661a(b)(8), 7661b(e); 40 CFR § 70.4(b)(3)(viii).

State Authority: § 25-7-114.4(1)(o), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part

A, § VII.A.-B. (Adopted July 15, 1993, Effective September 30, 1993).

XIV. ENFORCEMENT OF PERMITS PROGRAM REQUIREMENTS

State law provides civil and criminal enforcement authority consistent with 40 CFR § 70.11, including authority to recover penalties and fines in a maximum amount of not less than \$10,000 per day per violation.

Federal Authority: CAA § 502(b)(5)(E), 42 U.S.C. § 7661a(b)(5)(E); 40 CFR §§ 70.4(b)(3)(vii), 70.11.

State Authority: §§ 25-7-115, 25-7-122, 25-7-122.1, C.R.S. (1989 & 1993 Supp.).

XV. AUTHORITY TO ENFORCE LAPSED PERMITS

State law provides authority to enforce the terms and conditions of a permit which has expired, if the source has filed a timely and complete application for renewal, so as to assure compliance with all applicable requirements.

Federal Authority: CAA § 502(b)(5)(A), 42 U.S.C. § 7661a(b)(5)(A); 40 CFR § 70.4(b)(10).

State Authority: § 25-7-114.5(7)(b), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, § IV.C. (Adopted July 15, 1993, Effective September 30, 1993).

XVI. EPA PERMIT VETO

State law provides that an operating permit will not issue if the Administrator of EPA (or her designee) objects in a timely manner to its issuance pursuant to 40 CFR § 70.8(c) or, if the permit has been issued, but the Administrator or her designee objects pursuant to 40 CFR § 70.8(d), it will be reissued.

Federal Authority: CAA §§ 502(b)(5)(F), 505(b), 42 U.S.C. §§ 7661a(b)(5)(F), 7661d(b); 40 CFR §§ 70.4(b)(3)(ix), 70.8(c)-(d).

State Authority: §§ 25-7-114.5(7)(a)(IV), 25-7-114.7(2)(d), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ V.B.5., VI.H.

XVII. FINAL AGENCY ACTION ON PERMITS

State law provides that, solely for the purposes of obtaining judicial review in State court for the Colorado Air Pollution Control Division's failure to take final action, "final permit action" shall include the failure of the Colorado Air Pollution Control Division to take final action on an application for a permit or permit revision within 18 months or permit renewal within 12 months. The Colorado Air Pollution Control Division's failure to take final action within 90 days of receipt of an application requesting a minor permit modification (or 180 days for minor modifications subject to group processing requirements) is subject to judicial review in State court.

Federal Authority: CAA § 502(b)(7), 42 U.S.C. § 7661a(b)(7); 40 CFR § 70.4(b)(3)(xi).

State Authority: § 25-7-114.5(7)(b), C.R.S. (1993 Supp.).

XVIII. DEFAULT PERMIT ISSUANCE

State law does not authorize the issuance, modification, or renewal of any permit based on the passage of a specified time period when Colorado Air Pollution Control Division has failed to take action on the application, and does not include any other similar provision providing for default issuance of a permit unless EPA has specifically waived the right of review for itself and affected States.

Federal Authority: CAA § 505(a)-(e), 42 U.S.C. § 7661d(a)-(e); 40 CFR § 70.8(e)

State Authority: §§ 25-7-105(12), 25-7-114.4(1), and 25-7-114.5(7)(b) (1993 Supp.).

Remarks of the Attorney General: Although State law does not expressly prohibit the default issuance of operating permits upon failure of the Colorado Air Pollution Control Division to issue operating permits within the time prescribed by regulation, such a prohibition is implied in the law. The above statutory provisions require promulgation of regulations that satisfy the minimum federal requirements of the title V program, and the only relief provided for failure to issue an operating permit in a timely fashion is judicial review to require prompt action on the application. Additionally, Senate Bill 92-105, amending the State Act to conform to federal requirements under the 1990 Clean Air Act Amendments and effective on July 1, 1992, deleted a provision in the former laws that did allow default issuance of permits.

XIX. OPPORTUNITY FOR JUDICIAL REVIEW OF PERMIT ACTIONS

State law provides an opportunity for judicial review in State court of any final permit action by the applicant, any person who participated in the public-participation process provided pursuant to the CAA and 40 CFR § 70.7(h), or any other person who could obtain judicial review of such actions under State laws, including the Colorado Administrative Procedures Act and the Colorado Rules of Civil Procedure. Any provisions of State law which limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 CFR § 70.4(b)(3)(x).

State Authority: §§ 25-7-114.5(7), 25-7-114.5(11), 25-7-120(1), C.R.S. (1989 & 1993 Supp.); § 24-4-106(4), C.R.S. (1988); Rule 106(4), Colo. R. Civ. P. (1990).

XX. LIMITATIONS ON JUDICIAL REVIEW

State law provides that the opportunity for judicial review of a final permit action in State court described in paragraph XIX of this opinion shall be the exclusive means for obtaining judicial review of the terms and conditions of permits. State law provides that petitions for judicial review must be filed no later than 30 days after the final permit action. When new grounds exist for amendment or modification of the State's final determination on the permit action, arising after the deadline for judicial review, Rule 59(d) of the Colorado Rules of Civil Procedure permits the filing of a motion for new trial based upon newly discovered evidence. The motion must be filed within 15 days of the entry of the final decision on the permit. New Jersey Zinc Co. v. Mined Land Reclamation Board, 738 P.2d 51 (Colo. App. 1987). State law further provides that if the final permit action being challenged is the Colorado Air Pollution Control Division's failure to take final action, a petition for judicial review may be filed at any time before the Division denies the permit or issues the final permit.

Federal Authority: CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6); 40 CFR § 70.4(b)(3)(xii).

State Authority: §§ 25-7-114.5(7)(b), 25-7-114.5(11), 25-7-120(1), C.R.S. (1989 & 1993 Supp.); § 24-4-106(4), C.R.S. (1988); Rule 59(d), C. R. Civ. P. (1990).

XXI. COORDINATION WITH ACID RAIN PROGRAM REQUIREMENTS

State law is consistent with, and cannot be used to modify, the Acid Rain Program requirements of 40 CFR part 72.

Federal Authority: CAA §§ 408(a), 506(b), 42 U.S.C. §§ 7651g(a), 7661e(b); 40 CFR §§ 70.4(b)(3)(xiii), 72.70(b), 72.72(a).

State Authority: § 25-7-114.3(4), C.R.S. (1993 Supp.); Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part C, §§ III.B.4., III.F., IV.C., V.C.8., X.K., XI., XIII.A.2. (Adopted July 15, 1992, Effective September 30, 1993).

Additional Remarks of the Attorney General: The EPA has requested additional comment on the following issues.

1. Variances. State law does not authorize the granting of a variance from an applicable requirement or from the terms of an operating permit by the Colorado Air Pollution Control Division. Section 25-7-117, C.R.S. (1989), allows a source to petition the Colorado Air Quality Control Commission for a revision to the State Implementation Plan. This provision, however, requires conformance with Section 110 of the Federal Act, including procedural requirements necessary for EPA approval; upon EPA approval, any variances become SIP revisions, federal requirements, and are federally enforceable.

The EPA has expressed concerns that § 25-7-118, C.R.S. (1989 & 1993 Supp.) (provisions for delayed compliance orders), may be used to authorize variances from applicable requirements or permit terms. With regard to the operating permit program, this provision is intended to mirror the federal enforcement provision found in 42 U.S.C. § 7413(a)(4) (requirements for orders). As found in the federal act, the state delayed compliance order provision permits the issuance of such an order for no longer than one year, and provides, in subsection (7) that no order issued pursuant to this provision "shall prevent the state from assessing penalties nor otherwise affect or limit the state's authority to enforce under other provisions of this article." The Colorado Air Pollution Control Division is charged with administering the air quality program adopted by the Colorado Air Quality Control Commission (§ 25-7-111, C.R.S.), and such program must meet the minimum federal requirements of Title V (§ 25-7-105(12), C.R.S.). As such, the delayed compliance order provisions on § 25-7-118 will be administered in a manner conforming to federal requirements. Any person unable to comply with applicable requirements or a permit term may be given, as a matter of enforcement discretion, a period of up to one year to come into compliance; however, penalties apply during this period, as provided for in the federal act.

2. Automatic Stay on Administrative Appeal. Colorado law does not provide for automatic stays of permit decisions pending appeal. Section 25-7-122.6, C.R.S. (1993 Supp.), requires persons to whom an order has been issued, or against whom an adverse determination has been made, to petition the Colorado Air Quality Control Commission or the district court for a stay of the effectiveness of such order or determination.

3. Authority to Implement Section 112 Authorities. States must have full authority to develop case-by-case MACT emission limitations for major sources of hazardous air pollutants in two situations: (a) under new source review, where a major source of hazardous air pollutants is constructed or modified and no National Emission Standard for Hazardous Air Pollutants (NESHAP) applies (section 112(g) of the federal act); and (b) under Title V, where an operating permit is to be issued for a major source of hazardous air pollutants and EPA has failed to meet the deadline to promulgate a source category NESHAP (section 112(j) of the federal act).

Section 25-7-114.3, C.R.S. (1993 Supp.), provides that no source subject to emission standards or regulations for hazardous air pollutants under section 112 of the federal act may operate without first obtaining an operating permit from the Colorado Air Pollution Control Division "in a manner consistent with the requirements of . . . the federal act." This provision meets the requirement of Section 112(j) of the federal act.

Sections 25-7-109.3 and 25-7-114.2, C.R.S. (1993 Supp.), provide authority for the Colorado Air Pollution Control Division to develop case-by-case MACT for new sources of hazardous air pollutants under section 112(g) of the federal act. Section 25-7-109.3(1) requires the Air Quality Control Commission to promulgate regulations pertaining to hazardous air pollutants that are consistent with section 112 of the federal act, which would include the authority to develop case-by-case MACT for new sources of hazardous air pollutants as required by the federal act. Section 25-7-114.2 provides that no person "shall construct or substantially alter any building, facility, structure, or installation . . . or commence operations of any of the same which will or do constitute a new stationary source" without first obtaining or having a valid construction permit. Therefore, these two state provisions, in combination, provide the requisite section 112(g) authority to include case-by-case standards in construction permits.

The federal act requires that operating permits must include all applicable requirements, and EPA has requested an opinion that confirms the Air Pollution Control Division's authority to include federal hazardous air pollutant standards in operating permits, even if these standards have not yet been promulgated as state regulations. The State Act, at § 25-7-124(3), C.R.S.

(1989), precludes the Division from requiring compliance with any emission control regulation until the same has been adopted pursuant to proper rulemaking. However, § 25-7-109.1, C.R.S. (1993 Supp.), authorizes the Air Quality Control Commission to conduct emergency rulemaking hearings upon little or no notice to adopt interim regulations to conform to the federal act whenever federal regulations are adopted and effective pursuant to section 112 of the federal act and which modify or adopt MACT or GACT for new or existing sources, and when "such regulations are required to be implemented by the states." These interim regulations are effective for a period of one year, and would allow the Air Quality Control Commission adequate time to adopt final regulations in compliance with state rulemaking procedures pursuant to § 24-4-103, C.R.S. (1988 & 1993 Supp.). The Colorado Air Pollution Control Division has 18 months within which to issue operating permits; the emergency rulemaking procedures guarantee that the Division and Commission will have adequate time and authority to promulgate federal hazardous air pollutant standards as state regulations and include them in operating permits as required by federal law.

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